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Supreme Court, U.S.
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No. 09-

IN THE
SUPREME COURT OF THE UNITED STATES

TAYLOR ACQUISITIONS, LLC,

Petitioner,

v.

CITY OF TAYLOR and CAMERON G. PRIEBE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether a grant of a writ of certiorari is warranted where, if left without review, the decision of the United States Court of Appeals for the Sixth Circuit will permit courts considering claims for denial of rights to equal protection of the laws to focus not on state action, but on "state actors" and will effectively bar plaintiffs from maintaining claims against municipalities for denial of equal protection of the laws

Whether a grant of a writ of certiorari is warranted where, if left without review, the decision of the United States Court of Appeals for the Sixth Circuit which misconstrues state law will permit federal courts to dismiss claims for denial of due process on the incorrect conclusion that the plaintiffs asserting those claims did not have a protected property interest under state law

Whether a grant of a writ of certiorari is warranted where the decision of the United States Court of Appeals for the Sixth Circuit was erroneous in fundamental respects as to petitioner's claim for denial of its rights to procedural and substantive due process and as to whether petitioner had a protected "liberty interest"

PARTIES TO THE PROCEEDING

Petitioner Taylor Acquisitions, LLC was the plaintiff-appellant below.

Respondents the City of Taylor and Cameron G. Priebe were the defendants-appellees below.

CORPORATE DISCLOSURE STATEMENT

Petitioner, a Michigan limited liability company, has no parent corporation, and no publicly held company owns ten percent or more of its stock. Rule 29.6.

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DECISIONS BELOW

The decision of the United States Court of Appeals for the Sixth Circuit affirming the district court's judgment is unreported and is reproduced in the Appendix, App. A1-A23. The decision of the United States Court of Appeals for the Sixth Circuit denying the petition for rehearing en banc is unreported and is reproduced in the Appendix, App. A24. The underlying decision of the United States District Court for the Eastern District of Michigan is unreported and is reproduced in the Appendix, App. A25-A40.

STATEMENT OF JURISDICTION

The order of the United States Court of Appeals for the Sixth Circuit denying the petition for rehearing en banc was filed on May 6, 2009. This Court has jurisdiction to review this decision under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISION INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides as follows, in pertinent part: "nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

This petition seeks review of the decision of the United States Court of Appeals for the Sixth Circuit affirming the decision of the United States District Court for the Eastern District of Michigan granting summary judgment in favor of respondents the City of Taylor, Michigan and Cameron G. Priebe and denying summary judgment to petitioner, and of the United States Court of Appeals for the Sixth Circuit denying appellant's petition for rehearing en banc.

A. Facts Of The Case

In 2002, Sam Blumenstein, a developer with nearly 30 years of experience in the industry and principal of petitioner Taylor Acquisitions, was solicited by representatives of the City of Taylor ("the City") to take over the construction of the Brownstones at Midtown, a condominium project that had been started by another developer who unexpectedly died. Blumenstein did an excellent job on the Brownstones at Midtown project, and it was considered to be one of the jewels of redevelopment within the City.

When Blumenstein was nearly finished with the Brownstones at Midtown condominium project, then-Mayor Gregory Pitoniak, then-City Development Director Fred Zorn and other City representatives met with Blumenstein individually and with his Taylor Acquisitions team to collectively discuss a prospective area for development. This project, which came to be known as the Taylor Enclaves project ("the Enclaves"), involved the development of 31 areas of property, approximately six acres of which were City-owned property. The City-owned parcels were key

parcels around which petitioner assembled the prospective designs of the development.

After negotiation with the City, petitioner agreed to purchase the six City-owned parcels for a total of $1.5 million. The appraised value of the parcels was $870,000.00. Petitioner also owned portions of the total land it intended to develop, and had purchase agreements on the remaining non-City-owned parcels.

Petitioner worked closely with City representatives to develop the plans for the planned unit development ("PUD") for the Enclaves project. During the period from 2004 through October 2005, City representatives recommended many modifications to the plans, including reducing the number of proposed condominium units on the PUD initially from more than 300 down to 277, and ultimately to 241; modifying the unit sizes, the green space, the parking, brick colors and paint colors; increasing the amount of brick on each unit, thus reducing the amount of siding; including sidewalks into the PUD; and mandating a berm between the development and a nearby shopping mall parking lot. In a final change, Zorn wanted a more modern or urban looking sign leading into the development, made of black or dark granite, rather than a more "rural" sign. Petitioner's team modified and incorporated all of these changes.

The Enclaves project went before the various boards and departments within the City approximately 15 times, and was reviewed by the City attorneys, the Brownfield Redevelopment Authority Board, the Tax Incremental Finance Act (TIFA) Board, the Planning Department, the Brownfield Commission and the City Council. At any one of those meetings, City representatives could have voted to stop the project, but did not. Instead, the project received endorsements of each of the City's departments. On July 19,

2005, City Council approved "The Brownfield Plan Amendment Site 32 - Racho and Superior (Taylor Enclaves Brownfield Plan)."

City Council on September 20, 2005 approved the Agreement for the Purchase and Sale of the six City-owned parcels to petitioner. Though there was a term of the contract stating that the "effective date" of the agreement was the date upon which the last party signed the agreement and that the agreement shall be void if not executed by the seller (the City) and a signed original returned to the purchaser by July 22, 2005, the City Council was aware of this provision, and voted to approve it by authorizing the Mayor and the City Clerk to enter into the agreement after July 22, effectively ratifying an extension of the agreement. The City Council also approved the Development Agreement between the City and petitioner.

On October 5, 2005, the Enclaves project was presented to the Planning Commission for consideration. This occurred only after the project had received the approval of the Brownfield Redevelopment Authority, the TIFA Board and after the City Council had voted to approve the Brownfield Development Agreement, the Purchase Agreement and the Development Agreement. The project had been reviewed by each relevant City department and cleared for final approval by the City Council.

Pitoniak, Christopher Kemp (a City Council member and its representative to the Planning Commission) and City Council member Greg Bzura, who were very familiar with the project, averred under oath in a declaration submitted to the district court that the Enclaves project was one of the best projects to come before the Planning Commission and City Council. It was in an excellent location to offer traffic to the nearby retailers. The project was well-designed to offer a

good mix of condominium homes at a price point that was attractive to potential homeowners. It would have immediately generated $1,500,000.00 in revenue for the City through the sale of the land. The City would have an immediate increase in the tax base once improvements to the land were begun. According to City representatives, this project was in the best interests of the City.

During the October 5, 2005 Planning Commission meeting, Cameron Priebe, a candidate running for mayor, spoke out negatively against the Enclaves project. In a very contentious manner, Priebe demanded that the Planning Commission put the brakes on the Enclaves project, for no rational basis. City Council member Kemp told Priebe "that he could not try to tell the Planning Commission how to vote on any project. The Planning Commission is a diverse group of individuals whose role it is to review each and every proposed development project from many directions, to consider all factors, and to act in the best interests of the City of Taylor." Fred Zorn, who made the motion to the Planning Commission for approval of the Enclaves project, responded to Priebe and defended petitioner, reciting all the benefits of the Enclaves project. He testified: "I have always spoke [*sic*] highly of the organization as an entity that could sell product. And to Ms. Johnson, her ability, that they understood Taylor. They knew how to get Taylor info, sponsor events, that they always impressed me sales wise."

It is undisputed that Cameron Priebe did not speak out at the Planning Commission or at the City Council against any development but this one, either before or after this incident.

The Taylor Enclaves project was tabled at the October 5, 2005 Planning Commission Hearing, pending suggested changes to the PUD. Petitioner made the

suggested changes, and the project was unanimously approved.

The matter was submitted to City Council on November 1, 2005 to (a) to approve/deny a resolution to approve the Brownfield Plan Amendment Site 32 - Racho and Superior; (b) amend the City's Master Plan; (c) rezone a portion of the subject property; and (d) approve/deny the PUD. Each resolution passed with 6-1 vote; only Pauline Ettore voted against the proposal.

The city election was held on Tuesday, November 8, 2005. Mayoral candidate Priebe was voted into office. Pauline Ettore (the lone dissenting vote to the Taylor Enclaves project) and Christopher Kemp lost their re-election bids.

There was a City Council study session held on the evening of November 14, 2005, in petitioner presented an overview of the Enclaves project, which was placed on the agenda for the November 15, 2005 City Council. However, rather than vote on this matter, City Council voted to table the item, with the expectation that it would be brought back on for second reading at the next scheduled City Council session on December 6, 2005.

Before that City Council meeting, Mayor Priebe, unilaterally and without authority under the City Charter, directed an attorney to issue a letter dated December 1, 2005, allegedly terminating the Agreement for Purchase and Sale between Taylor Acquisitions and City of Taylor. The appropriate method in which to rescind or cancel a contract was to bring the contract before the City Council for a vote to approve/deny rescission or revocation of the contract, since City Council approval was required by Charter. Yet the Mayor did not seek City Council approval before issuing

the letter, nor did City Council members know that the Mayor had taken steps to terminate the contract.

Never during his term of office (1997-2005) did Mayor Pitoniak ever rescinded a contract for the sale of land, Brownfield Plan or other development agreement, without first obtaining City Council approval, nor did Cameron Priebe ever take such action during his first mayoral tenure (1981-1988) without first obtaining City Council approval.

Though the Planning Department submitted the Enclaves project as an item for inclusion on the agenda for the December 6, 2005 City Council meeting, the Enclaves project was not on the agenda. During the last two minutes of the meeting during open forum, a member of the audience asked the status of the Enclaves project. Priebe advised the project "was dead" two weeks prior.

Petitioner was advised that Priebe unilaterally would not allow the matter to be placed back on the agenda. During litigation, City representatives testified or averred under oath that petitioner was treated differently than all other developers whose projects had come before the City Council for approval. They also averred under oath that, during their entire tenure with the City, no proposed housing development project has gone through more scrutiny than that of petitioner. At each juncture, petitioner fully complied with requests and recommendations made by City representatives. These same witnesses also averred under oath that there was no rational basis for treating petitioner differently from other similarly-situated persons - developers dealing with the City, and that the actions of which petitioner complained were done solely because of animus or ill-will, for political purposes. Because there had been extensive scrutiny by each and every City department, petitioner justifiably expected that the City Council would vote to

approve the second reading of the project, but City Council was deprived of that opportunity by Priebe's unilateral actions.

B. Proceedings Below

Petitioner filed suit through 42 U.S.C. §1983, alleging that respondents had deprived petitioner of its rights to procedural and substantive due process and to equal protection of the laws, as guaranteed by the Fourteenth Amendment. The district court dismissed petitioner's due process claims and granted summary judgment in respondents' favor on petitioner's equal protection claim (and denied petitioner's motion for summary judgment). The United States Court of Appeals for the Sixth Circuit ("the Sixth Circuit") affirmed the district court's decision, and denied petitioner's petition for rehearing en banc.

REASONS FOR GRANTING THE WRIT

This Court has long upheld the guarantees in the Fourteenth Amendment to the United States Constitution that a person shall not be deprived of property rights and liberty interests without due process of law, and that all persons shall be afforded equal protection of the laws.

However, in the ruling on which petitioner seek review before this Court, petitioner was deprived of its right to equal protection of the laws and of its property rights and liberty interests with due process of law, contrary to rulings of this Court and other circuits. Petitioner has been deprived of its constitutional rights and has no other recourse.

This Court should grant review of this petition because the ruling of the Sixth Circuit in this matter clearly

decides important questions of federal constitutional law in a way which directly conflicts with decisions of this Court and other Circuits. Absent review by this Court, courts will be permitted under the Sixth Circuit's decision effectively to bar plaintiffs from maintaining claims against municipalities for denial of their rights to equal protection, if the governing boards of those municipalities ever change even a single member.

This Court's intervention is also required because the Sixth Circuit's decision misconstrues state law. Absent review, federal courts will be permitted to conclude erroneously that plaintiffs such as petitioner did not have protected property rights, contrary to the controlling case authority of the state (Michigan in the case at bar) in which the property rights arose.

Review is also warranted because the decision below is mistaken in three fundamental respects. First, the Sixth Circuit misconstrued the facts of this case, erroneously concluding that petitioner was not deprived of its procedural due process rights. Second, the Sixth Circuit's misconstruction of the facts also led it to conclude erroneously that petitioner was not deprived of its substantive due process rights. Third, the Sixth Circuit erroneously determined that petitioner did not have a protected "liberty interest."

I. THE DECISION BELOW DIRECTLY CONFLICTS WITH THE RULINGS OF THIS COURT AND DECISIONS OF OTHER FEDERAL CIRCUITS AND MISCONSTRUES STATE LAW

A. The Sixth Circuit's Decision Failed To Focus On The Challenged State Action,

Contrary To The Rulings Of This Court And Decisions Of Other Circuits, And Effectively Bars Plaintiffs From Maintaining Claims Against Municipalities For Denial Of Equal Protection Of The Laws

Petitioner brought its claim for violation of its equal protection rights as a "class of one," as this Court set forth in *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000). Petitioner submitted to the district court evidence averred under oath from several witnesses that it was treated differently than every other developer or development project which came before the City Council. Even though respondents never rebutted this evidence, the district court held that petitioner's "bare allegations" - as it described the several sworn averments of witnesses, many of whom were City representatives - were insufficient to establish that the developments were similarly situated.

The Sixth Circuit affirmed the district court's decision, finding only that petitioner was not similarly situated to other developers and other development projects because petitioner's project was considered by two differently-composed City Councils (App. 15a). The Sixth Circuit then relied upon two cases from other circuits for the proposition that because the November 8, 2005 election changed two members of the City Council, petitioner could not be similarly situated to any other developer or project. The Sixth Circuit did not give any other reason for its decision to affirm the district court's denial of petitioner's equal protection claim.

Yet the cases on which the Sixth Circuit relied do not stand for the proposition for which the Sixth Circuit cited them. In the first case which the Sixth Circuit cites, *Cordi-*

Allen v. Conlon, 494 F.3d 245 (1st Cir. 2007), one property (which was used as a comparable to the plaintiff) had received a building permit four years earlier than had the plaintiff, and there were other substantial differences between the two projects. This led the First Circuit to conclude that the projects were not similarly situated. Contrary to the implication that the Sixth Circuit makes by citing to this case, the First Circuit did not rely upon a change in the membership of the City Council as a basis for asserting that the two projects were not similarly situated. Instead, the First Circuit found that time may be a consideration when analyzing similarly situated property developments because zoning laws, environmental standards and licensing criteria may change over time, *not that members of the governmental body may change*. Significantly, the Sixth Circuit omitted this portion of the First Circuit opinion when it quoted from this case.

The Sixth Circuit also cited *Purze v. Village of Winthrop Harbor*, 286 F.3d 452 (7th Cir. 2002). In that case, while the Seventh Circuit noted that the plaintiff was not similarly situated to another individual who had submitted a plat request which was granted by a prior village board, the court made clear that these individuals were not similarly situated because the prior plat request was submitted over 20 years before that submitted by the plaintiff. *Id.* at 455. Likewise, the Seventh Circuit found that the plaintiff's property was not similarly situated to another property which involved the grant of a variance which the plaintiff in this case had never requested. *Id.* at 455-56.

But the case at bar is wholly distinguishable from *Purze*. The similarly-situated developments about which petitioner provided sworn evidence were all recently approved by the City Council between the previous election

and the November 8, 2005 election, or after the November 8, 2005 election. Petitioner maintained that, unlike its project, all these projects had received a second reading and approval. There was not a 20-year period between when petitioner sought approval of its project, and a previously approved project, as happened in *Purze*.

In the instant case, the Sixth Circuit did not point to *any* differences between the developers and projects which were similarly-situated to petitioner, as set forth in great detail in the affidavits and declarations petitioner had provided to the district court, and that of petitioner, except that two members of the City Council (and the Mayor, who is not a member of City Council) changed after the November 8, 2005 election. Contrary to the assertion of the Sixth Circuit, there is no case authority from this Court or any other federal circuit court which holds that a change in some of membership of a governmental body may serve as a basis for a court to find that decisions by that governmental body as to two otherwise similarly-situated entities or individuals cannot serve as the basis for a claim for denial of equal protection, because a member or two of that body changed after an election.

However, the Eleventh Circuit has held that governmental decision making challenged under a "class of one" equal protection theory must be evaluated in light of the full variety of factors that an objectively reasonable governmental decision maker would have found relevant in making the challenged decision. *Griffin Industries, Inc. v. Irvin*, 496 F.3d 1189, 1204 (11th Cir. 2007), *cert. denied*, 128 S. Ct. 2055, 170 L. Ed. 794 (Apr. 21, 2008).

Petitioner submits that this should be the proper inquiry when a court analyzes an equal protection claim regarding property development. Whether one development

is similarly situated to another should be determined by the factors which the governmental decision maker would find relevant when making its decision, not by a consideration of whom the members of the governmental decision maker are.

By focusing only on who the decision makers were, the Sixth Circuit, for example, has taken the inquiry away from the decision making process, contrary to every decision by every federal court on this subject. This Court has often acknowledged the tenet of equal protection jurisprudence that state action is required before a plaintiff may allege a violation of the Equal Protection Clause of the Fourteenth Amendment. *Village of Willowbrook, supra.* Thus, it is state action, and not state actors, which rightfully should be the focus of any court analysis on an equal protection claim.

Yet in the instant case, the Sixth Circuit improperly and incorrectly did not consider the challenged state action, but merely the change in the "state actors." This narrow determination as to that which constitutes "similarly situated," not only is contrary to prior decisions of this Court and other federal courts, it, in essence, eliminates any cause of action against a municipality for denial of equal protection under the law as guaranteed by the Fourteenth Amendment.

As the Sixth Circuit defined "similarly-situated" entities, petitioner had to be "identical" to other developers in that it had to have its proposals considered by a City Council which had the exact same members as did the City Council which considered the proposals of other developers of the same type of projects. However, this is not the standard which the Sixth Circuit or this Court has applied in cases alleging that entities or individuals were "similarly-situated" to each other. Instead, the Sixth Circuit has ruled previously that courts should "not demand exact correlation, but should instead seek relevant similarity." *Perry v.*

McGinnis, 209 F.3d 597, 601 (6th Cir. 2000) (*citing Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 352 (6th Cir. 1998)).

Under the Sixth Circuit's determination, no plaintiff could ever maintain a claim for denial of equal protection under the law against a municipality if there were any changes in the members who comprised the municipality's governing council or board. Since these changes happen regularly by election or appointment of a new council or board member to a vacated position, it would be nearly impossible for a plaintiff to obtain a decision from a governing body which was identical in composition to that which made decisions about other entities who, in all other respects, would be considered "similarly-situated." The Sixth Circuit's decision effectively bars any plaintiff from bringing a claim against a municipality for denial of its rights to equal protection of the laws unless that plaintiff can demonstrate that the composition of the governing body which made the decision at issue is identical to that which treated otherwise "similarly-situated" entities more favorably. Petitioner respectfully submits that granting its petition for a writ of certiorari is warranted to correct this erroneous decision, which will otherwise have an unjustified preclusive and chilling effect on future equal protection claims.

Additionally, while the Sixth Circuit concluded that the City had a rational basis for its actions, this conclusion is not supported by the record or the prior decisions of this Court, the Sixth Circuit or other circuit courts. There was no evidence whatsoever in the record that the Taylor City Council changed so much that it would have voted against petitioner's project had the matter been put on the agenda. This is not a case where a differently-comprised City Council voted to defeat a previously-approved project or

terminate a purchase agreement. Instead, the City Council voted to approve petitioner's project but was wrongfully precluded from acting thereafter because of the mayor's unauthorized unilateral action, which deprived petitioner of the same treatment afforded to other developers who did obtain a second vote on their projects.

The record demonstrates that there was no evidence before the panel or the district court as to the purported "rationale" for respondents' actions. The *only* "evidence" on which respondents relied were respondent Priebe's own statements, which were specifically contradicted by no less than four former City representatives (Pitoniak, Kemp, Bzura and Riddle) as well as petitioner, and even the deposition testimony of respondents' own witness, Fred Zorn. There was absolutely no evidence of City Council's "reasonable and appropriate objectives," App. 17a, contrary to the Sixth Circuit's decision.

The record was clear that, since City Council was precluded by Priebe from ever making a decision on petitioner's project. Priebe did not legally have the authority under the City Charter to terminate the purchase agreement. This evidence destroys any argument that there could conceivably ever be a rational basis for that action. Likewise, there was no evidence in the record to support respondents' argument in its pleadings, which the Sixth Circuit adopted as "evidence," that respondents wanted to curtain residential development. There is no prior decision of this Court or the Sixth Circuit or any other circuit court which states that a municipality's rationale for its actions can be inferred from its not taking any action at all. Therefore, there was no basis on which the Sixth Circuit could have affirmed the district court's grant of summary judgment on petitioner's claim for deprivation of its rights to equal protection.

Accordingly, because the Sixth Circuit based its affirmation of the district court's denial of summary judgment to petitioner on the change of the membership of the City Council, and there is no case authority on which the Sixth Circuit could reasonably infer such a basis to affirm the district court, petitioner submits that the dismissal of its equal protection claim was contrary to established precedent from this Court and other circuit courts. Only this Court can resolve this conflict between these decisions and the Sixth Circuit's ruling in the case at bar, and prevent the preclusive effect of the Sixth Circuit on plaintiffs who bring claims against municipalities for denial of their rights to equal protection of the laws. Petitioner therefore respectfully requests that this Court grant review in this case.

B. The Sixth Circuit's Decision Misconstrues State Law, Leading To An Erroneous Conclusion That Petitioner Did Not Have A Protected Property Interest Sufficient To Support Its Claims For Denial Of Its Rights To Procedural And Substantive Due Process

Petitioner brought its claim for violation of its procedural and substantive due process rights by virtue of the execution of several purchase agreements for property owned by both the City, which the Mayor rescinded without City Council approval, and private third parties. The district court and the Sixth Circuit both misconstrued Michigan law to hold that petitioner had no protected property interest, thereby warranting review in this case.

The district court and the Sixth Circuit both correctly observed that property interests are not defined by the United States Constitution, but are created and defined by state law.

Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972). The district court relied upon *Bryan v. City of Madison*, 213 F.3d 267 (5th Cir. 2000), which held that a purchase agreement does not convey a property right, but merely confers an interest to get the down payment back if the seller does not make good title. On appeal to the Sixth Circuit, petitioner argued that the district court's reliance on that case was misplaced, as *Bryan* was decided pursuant to Mississippi state law, not Michigan state law.

In its opinion, the Sixth Circuit stated that neither petitioner nor respondents, nor the Sixth Circuit itself, were able to find any Michigan cases to the contrary, App. 6a. However, in making that statement, the Sixth Circuit wholly ignored the Michigan cases on point which petitioner had cited in its reply appellate brief. These cases demonstrated that, under Michigan law, it is well-settled that the execution of a purchase agreement transfers interest in the property to the purchaser. *Graves v. American Acceptance Mortgage Corp. (on Rehearing)*, 469 Mich. 608, 614, 677 N.W.2d 829 (2004); *Stevens v. DeBar*, 229 Mich. 251, 253, 200 N.W. 978 (1924); *Zurcher v. Herveat*, 238 Mich. App. 267, 291, 605 N.W.2d 329 (1999); *Charter Twp. of Pittsfield v. City of Saline*, 103 Mich. App. 99, 103, 302 N.W.2d 608 (1981); *State Hwy. Commissioner v. Flanders*, 5 Mich. App. 572, 147 N.W.2d 441 (1967) (property interest created by a right of way purchase agreement). In Michigan,

> [a] trial court should enforce the equities of the parties in such a manner as to put them as nearly as possible in the position that they would have occupied had the conveyance of the real property occurred when required by the contract.

Godwin v. Lindbert, 101 Mich. App. 754, 758, 300 N.W.2d 514 (1980). In other words, "[l]and, traditionally presumed to have a peculiar value, is subject to specific performance." *Kent v. Bell*, 374 Mich. 646, 651, 132 N.W.2d 601 (1965).

In *Lake Forest Partners 2, Inc. v. Dep't. of Treasury*, 271 Mich. App. 244, 720 N.W.2d 770 (2006), *reversed in part on other grounds* (relating to the state transfer tax), 480 Mich. 1046, 743 N.W.2d 881 (2008), the plaintiff executed 45 purchase agreements (each with a specific lot number) on unimproved lots, intending to build houses there. While reviewing the taxable value of the property, the court stated,

> Conceivably, [the land] could not be duplicated by an award of money. *Thus, execution of the purchase agreement transfers to the buyer an equitable interest in the property, which gives rise to a cause of action for possession of the property.*

271 Mich. App. at 249-50 (emphasis added).

As the above cases petitioner cited to the Sixth Circuit demonstrate, Michigan law holds that a purchase agreement creates a possessory interest in property. Thus, under state law, petitioner had a possessory interest in the property for which it had executed purchase agreements, and should have been allowed to proceed on its due process claims. This accords with the Sixth Circuit's prior opinion that

> It is well established that possessory interests in property invoke procedural due process protections.

Thomas v. Cohen, 304 F.3d 563, 576 (6th Cir. 2002) (citing this Court's opinion in *Fuentes v. Shevin*, 407 U.S. 67, 82 (1972)).

Instead, the Sixth Circuit discussed the doctrine of equitable conversion based on land contracts, not purchase agreements. The Sixth Circuit stated that a purchase agreement is sometimes referred to as a "contract for the sale of land." While that a purchase agreement is indeed a contract for the sale of land, it is not the same as a land contract. In *Zurcher v. Herveat*, 238 Mich. App. 267, 291; 605 N.W.2d 329 (1999), the Michigan Court of Appeals defined a land contract in this way:

> The term 'land contract' is commonly used in Michigan as particularly referring to agreements for the sale of an interest in real estate in which the purchase price is to be paid in installments (other than an earnest money deposit and a lump-sum payment at closing) and no promissory note or mortgage is involved between the seller and the buyer.

Under a land contract, the "vendor retains legal title until the contractual obligations have been fulfilled, [and] the vendee is given equitable title, and that equitable title is a present interest in realty that may be sold, devised, or encumbered." *Graves v. American Acceptance Mortgage Corp.*, *supra*, 469 Mich. at 614. Equitable title only passes to the vendee upon proper execution of the land contract. *Zurcher*, *supra*, 238 Mich. App. at 291.

Thus, under Michigan law, a purchase agreement is a contract for the sale of land, whereby the buyer obtains financing or otherwise procures the funding necessary to effectuate a closing, and upon execution of the closing

documents, a deed is given to the buyer. A land contract, by contrast, is a contract for the sale of land whereby the buyer makes installment payments to the seller in lieu of a mortgage. Accordingly, the Sixth Circuit misconstrued and incorrectly applied Michigan law when it held that purchase agreements did not convey any property interest petitioner. As a correct construction of Michigan law supports that petitioner had a protected property right sufficient on which to premise its claims for denial of its due process rights, petitioner therefore respectfully requests that this Court grant review in this case.

II. THIS COURT SHOULD ADDITIONALLY GRANT REVIEW BECAUSE THE DECISION BELOW IS ERRONEOUS IN FUNDAMENTAL RESPECTS AS TO PETITIONER'S CLAIMS FOR DENIAL OF ITS RIGHTS TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT

Petitioner submits that review is also warranted because the decision below is erroneous in three fundamental respects. First, the Sixth Circuit's decision erroneously concluded that petitioner had an adequate state remedy and that respondents' actions did not result in a deprivation of petitioner's rights to procedural due process. Second, the Sixth Circuit's decision erroneously held that since petitioner did not have a protected property right, it could not assert a substantive due process claim. Third, the Sixth Circuit's decision erroneously affirmed the district court's determination that petitioner did not have a protected "liberty interest" because petitioner could still be a developer. Petitioner accordingly seeks review of the Sixth Circuit's decision on these additional grounds.

A. The Sixth Circuit's Decision Misconstrues The Facts Of This Case And Erroneously Concludes That Petitioner Was Not Denied Its Rights To Procedural Due Process

Petitioner submits that the Sixth Circuit's decision erroneously held that even if the purchase agreement conveyed a property interest, petitioner could not establish the third prong of a procedural due process violation because there was an adequate state remedy. While the Sixth Circuit was correct that not every breach of contract claim rises to the level of a §1983 claim, petitioner submits this is not the garden variety contract claim. Petitioner entered into purchase agreements, created site plans, obtained the approvals of all necessary commissions and governmental bodies, and was denied the opportunity to obtain a vote on the final reading of its proposal by the City Council, whom was never given an opportunity to cast this vote because of the Mayor's wrongful action, which lacked any justification in the City Charter.

More importantly, respondents never gave petitioner notice or an opportunity to be heard before depriving it of its property interests. The Sixth Circuit's decision erroneously stated that because petitioner may have a remedy in state court, its procedural due process rights are protected. However, the third prong in a procedural due process claim that the panel cited states: "the state did not afford it adequate procedural rights *prior* to depriving it of that interest." *See Club Italia Soccer & Sports Org., Inc., v. Charter Twp. of Shelby*, 470 F.3d 286, 296 (6th Cir. 2006) (emphasis added).

Thus, the test is not whether a plaintiff has a remedy for being deprived of its property right, it is whether a plaintiff was afforded adequate procedural rights *before*

being deprived of its property right. In this case, petitioner was clearly afforded no opportunity at all to be heard. Simply, Priebe unilaterally - and without authorization or power under the City Charter - wrongfully deemed the purchase agreement terminated. This action was unilaterally taken by Priebe acting under color of law in his official capacity. The governing body, the City Council, was never given an opportunity to approve the action taken by Priebe. Under the City Charter, only the City Council could terminate the purchase agreement. This requires respondents to conduct the business of the City in public, which would have given petitioner notice of the proposed action and an opportunity to be heard. It is undisputed that this did not happen in this case.

Thus, it could have only been concluded that petitioner was afforded absolutely no due process before being deprived of its property right.

Accordingly, the Sixth Circuit's decision was in error when it determined that petitioner did not have a claim for deprivation of its procedural due process rights. Petitioner therefore respectfully requests that this Court grant review in this case.

B. The Sixth Circuit's Decision Misconstrues The Facts Of This Case And Erroneously Concludes That Petitioner Was Not Denied Its Rights To Substantive Due Process

Petitioner also submits that, since the Sixth Circuit's decision erroneously concluded that petitioner did not have a protected property right, it also erroneously concluded that petitioner could not assert a claim for denial of its right to substantive due process.

As set forth in the preceding section I.B, petitioner did have a protected property interests under state law on which it could base its claim for denial of its right to substantive due process. By contrast, in the case on which the Sixth Circuit relied, *Bowers v. City of Flint*, 325 F.3d 758 (6th Cir. 2003), the dispute involved not a constitutional right, but the enforcement of a city ordinance which allowed residents who paid their water bills on time a 5% discount. The Sixth Circuit held that this was a state-created contractual right which could be redressed by a breach of contract action, not by a claim for deprivation of a constitutional right.

Unlike *Bowers*, this case is not a garden variety breach of contract case. Here, a government actor, Mayor Priebe, unilaterally and without authorization from the City Council, terminated purchase agreements for six parcels of property that the City itself had wanted petitioner to develop. Priebe's actions not only deprived petitioner of its constitutionally protected property interests, it was also an abuse of the mayor's governmental authority. The mayor has no power to enter into or rescind contracts; only the City Council has that authority.

The decision of the Sixth Circuit thus erroneously concluded that the City had a "rational basis" for its actions because the City never took any action through its City Council, as the City Charter requires. While Priebe may have claimed that he had a rational basis for the action he took, that action was an unauthorized abuse of his governmental powers. Had the City Council been allowed to vote on the project, it likely would have approved the project, since the project had received approvals from every city department since the inception of the project. Since Priebe's action in terminating the purchase agreements were

unauthorized by law and contrary to City Charter, it cannot be argued that there was a rational basis for his actions.

Accordingly, since the Sixth Circuit's decision was in error when it concluded that petitioner could not state a claim for denial of its rights to substantive due process claim, petitioner respectfully requests that this Court grant review in this case.

C. The Sixth Circuit's Decision Erroneously Concludes That Petitioner Did Not Have A Protected "Liberty Interest"

Petitioner further submits that the Sixth Circuit's decision erroneously concluded that petitioner did not have a protected liberty interest. In its opinion, the Sixth Circuit affirmed the district court's dismissal of petitioner's liberty interest on its determination that petitioner could still be a "developer." Petitioner's complaint, however, did not limit the liberty interest to a right to develop this particular property. Contrary to the determination that petitioner was not deprived of its ability to pursue its occupation as a developer, there was absolutely no evidence of this before the district court and the Sixth Circuit, since this issue was presented by means of a Fed. R. Civ. P. 12(b)(6) motion. Thus, the district court had nothing before it on which it could make this "factual" conclusion, which the Sixth Circuit's decision erroneously confirmed. Instead of accepting the complaint as true in deciding whether petitioner had stated a claim, the Sixth Circuit affirmed the district court's ultimate factual determination that petitioner generally was not prevented from developing property without any evidence in the record to support this determination.

Yet the district court had previously recognized that

> [I]t is well established that the freedom to choose and pursue a career, to engage in any of the common occupations of life, qualifies as a liberty interest which may not be arbitrarily denied by the State.

R. S. S.W., Inc. v. City of Keego Harbor, 18 F. Supp. 2d 738 (E.D. Mich. 1998). The Sixth Circuit has recognized that the freedom to engage in business and fundraising is a "liberty interest" that is protected by the Due Process Clause. *Parate v. Isibor*, 868 F.2d 821 (6th Cir. 1989); *Wilkerson v. Johnson*, 699 F.2d 325 (6th Cir. 1983) (harassment and delay with respect to seeking a barber's license was a deprivation of a liberty interest). Indeed, the Sixth Circuit found a protected "liberty interest" where a municipality required a billiards parlor to have an "amusement device permit" and declined to grant such a permit – such arbitrary action prevented the plaintiff from engaging in whatever legal business he elected to pursue. *Sanderson v. Village of Greenhills*, 726 F.2d 284 (6th Cir. 1984).

In its order, the district court dismissed petitioner's substantive due process claim solely because petitioner allegedly "does not allege that defendants interfered with its right to pursue an occupation as a developer." Yet, review of the complaint demonstrated that petitioner did indeed set forth this allegation. Petitioner states in its complaint that its right to engage in the business of residential development was a fundamental liberty interest, and that respondents had deprived petitioner of that right. Contrary to the district court's decision, which the Sixth Circuit affirmed, petitioner did not limit its liberty interest to a right to develop the property at issue. Indeed, at paragraph 105 of the complaint, petitioner stated that respondents' actions interfered with its other residential developments. Thus, the district court's

order dismissing petitioner's substantive due process claim on a Rule 12(b)(6) motion finds no support in the pleading itself, and should have been reversed by the Sixth Circuit.

Accordingly, since the Sixth Circuit's decision was in error when it affirmed the district court's determination that petitioner did not have a protected liberty interest, petitioner respectfully requests that this Court grant review in this case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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August 4, 2009

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

TAYLOR ACQUISITIONS, L.L.C,
Plaintiff-Appellant,

vs. Case No. 07-2242

CITY OF TAYLOR and
CAMERON G. PRIEBE
Defendants-Appellees,

_____/

OPINION AND ORDER

BEFORE: McKEAGUE and GRIFFIN, Circuit Judges; and WEBER, District Judge.*

McKEAGUE, Circuit Judge. Plaintiff Taylor Acquisitions, LLC, sought to build a residential condominium development in the City of Taylor (the "City"). It entered into an agreement with the City to purchase City-owned property for the development. It also expended considerable amounts of time and money meeting with City officials and preparing and revising the required site plans for the project. Just as everything was about finalized, City residents elected a new mayor, and the progress on the development screeched to a halt. The City Council tabled a vote on the ordinances necessary to approve the development, and never approved the final site plans for the project. According to the mayor, the project was "dead."

Plaintiff then sued the City and the mayor, Cameron G. Priebe ("Defendants"), in federal district court for violation of its rights to procedural and substantive due process and equal protection. The district court granted Defendants' motion to dismiss as to the due process claims. Following discovery, it also granted Defendants' motion for summary judgment on the remaining equal protection claim. For the following reasons, we **AFFIRM** the judgment of the district court.

I. BACKGROUND

A. Factual Background

In December 2003, Plaintiff and City officials began discussing the possibility of building a 240-unit residential condominium development called "The Enclaves" at Racho Road and Superior Parkway, located near the Southland Mall in the City of Taylor. The proposed location consisted of approximately thirty-one acres and was comprised of thirteen parcels, six of which were owned by the City.

Plaintiff met with City officials several times after the initial meeting. According to Plaintiff, both parties contemplated that 1) the City would sell the six City-owned parcels to Plaintiff; 2) the City would rezone the entire property from commercial to residential and amend the City's Master Land Use Plan; 3) Plaintiff and the City would enter into a Brownfield Development Agreement for the property[1]; and 4) the City would approve the final site

[1]According to Plaintiff's complaint, the City established the Brownfield Redevelopment Authority in 1996. The City developed a Brownfield Plan to "promote the redevelopment of environmentally distressed, functionally obsolete and blighted properties" located within the City. Compl. ¶ 6, J.A. at 15; *see also* J.A. at 48. The Brownfield Plan states that "[p]roperties will be continually added to the Brownfield Plan as

plans for the project. In reliance on this mutual understanding, Plaintiff alleges that it invested significant amounts of money and time in developing the necessary plans for the project.

On September 20, 2005, the City Council voted to approve a Brownfield Development Agreement and a purchase agreement for the six City-owned parcels. The purchase price of the six parcels was $1.5 million. In accordance with the purchase agreement, Plaintiff submitted a $50,000 deposit to the City's escrow agent. Plaintiff also alleges that it entered into purchase agreements with the owners of the seven privately-owned parcels.

At the November 1, 2005 City Council hearing, the City Council voted to approve the amendment that added "The Enclaves" to the Brownfield Plan. It also voted to approve the first reading of an ordinance to amend the City's Master Land Use Plan. Finally, the City Council voted to approve the first reading of a zoning ordinance rezoning the thirteen parcels needed for Plaintiff's project from "Regional Business" to "Townhouse Residential/Planned Unit Development." Final approval of the amendment to the Master Land Use Plan and the zoning ordinance, as well as the final site plans for the development, was scheduled for the City Council meeting on November 15.

Meanwhile, on November 8, 2005, Defendant Cameron G. Priebe defeated the City's incumbent Mayor Gregory Pitoniak. Three incumbent City Council members were also defeated. Plaintiff alleges that, while Priebe was

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new Brownfield projects are developed." J.A. at 48. Brownfield Plans and any amendments must be submitted to the City Council for approval. Property approved as part of the Brownfield Plan receives several incentives involving taxes and financing.

running for mayor, he had attended meetings and disrupted proceedings related to Plaintiff's project. During that time, Plaintiff claims Priebe "demonstrated an inappropriate and unjustified animosity toward the project." Compl. ¶ 82, J.A. at 32.

Instead of voting on final approval of Plaintiff's site plans and approving the second readings of the oridnances to amend the City's Master Land Use Plan and rezone the property at the November 15 meeting, the City Council decided to table the issues until the following meeting on December 6. However, on December 1, Plaintiff received a letter from counsel for the City stating that the purchase agreement for the City's six parcels of land "is hereby termintated effective immediately." Compl. ¶ 88, J.A. at 33-34; J.A. at 166. The letter also stated that Plaintiff's $50,000 deposit would be refunded with interest. Plaintiff's project was not on the agenda for the December 6 City Council meeting, and the City Council did not hold a vote for final approval of the project. Mayor Priebe allegedly advised those in attendance that the project was "dead."

B. Procedural History

On February 14, 2006,Plaintiff filed a complaint against the City of Taylor and Mayor Priebe in the United States District Court for the Eastern District of Michigan. Pursuant to 42 U.S.C. § 1983, Plaintiff alleged violation of its rights to substantive and procedural due process and equal protection. The complaint sought damages as well as injunctive relief.

Defendants filed a motion to dismiss the complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. After a hearing and supplemental briefing, the district court granted the motion to dismiss on the

procedural and substantive due process claims. *Taylor Acquisitions, LLC v. City of Taylor*, No. 06-10650, 2006 WL 3085394, at *1 (E.D. Mich. Oct. 27, 2006). It denied the motion, however, with respect to Plaintiff's equal protection claim. *Id.*

After discovery was completed, Plaintiff and Defendants both filed motions for summary judgment on the equal protection claim. Four days after the hearing on the motions for summary judgment, plaintiff filed an emergency motion requesting leave to supplement its summary judgment pleadings. It sought to include as exhibits documents that had been recently produced by Defendants in accordance with Plaintiff's successful motion to compel. The district court denied the motion, concluding that Plaintiff had not sought the required continuance under Rule 56(f) of the Federal Rules of Civil Procedure. *Taylor Acquisitions, LLC v. City of Taylor*, No. 06-10650, 2007 WL 2827870, at *2 (E.D. Mich. Sept. 27, 2007). The district court then granted Defendants' motion for summary judgment and denied Plaintiff's motion for summary judgment. *Id.* Plaintiff timely appealed the final order of the district court.

II. DISCUSSION

A. Motion to Dismiss

Plaintiff first contends that the district court erred when it granted Defendants' motion to dismiss on Plaintiff's due process claims. Whether the district court properly dismissed these claims pursuant to Rule 12(b)(6) is a question of law, which we review *de novo*. *Bishop v. Lucent Techs., Inc.*, 520 F.3d 516, 519 (6th Cir. 2008). We must construe the complaint in the light most favorable to Plaintiff, accept all well-pleaded factual allegations as true,

and determine whether Plaintiff undoubtedly can prove no set of facts in support of those allegations that would entitle it to relief. *Id.* Yet, to survive a motion to dismiss, the complaint "must contain either direct or inferential allegations respecting all the material elements to sustain a recovery under some viable legal theory." *Mezibov v. Allen*, 411 F.3d 712, 716 (6th. Cir. 2005). Conclusory allegations or legal conclusions masquerading as factual allegations will not suffice. *Id.* While the factual allegations in the complaint need not be detailed, they "must be enough to raise a right to relief above the speculative level"—they must "state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1965 (2007); *see also Ass'n of Cleveland Fire Fighters v. City of Cleveland*, 502 F.3d 545, 548 (6th Cir. 2007). Finally, we may affirm the district court's dismissal of Plaintiff's claims on any grounds, including those not relied upon by the district court. *Zaluski v. United Am. Healthcare Corp.*, 527 F.3d 564, 570 (6th Cir. 2008).

1. Procedural Due Process Claim

The Fourteenth Amendment forbids a state from depriving any person of life, liberty, or property without due process of law. U.S. Const. amend. XIV, § 1. "Procedural due process generally requires that the state provide a person with notice and an opportunity to be heard before depriving that person of a property or liberty interest." *Warren v. City of Athens*, 411 F.3d 697, 708 (6th Cir. 2005). To establish a procedural due process violation, Plaintiff must demonstrate that 1) it possessed a constitutionally protected property or liberty interest; 2) it was deprived of that interest; and 3) the state did not afford it adequate procedural rights prior to depriving it of that interest. *See, e.g., Club Italia Soccer & Sports Org., Inc. v. Charter Twp. of Shelby*, 470 F.3d 286,

296 (6th Cir. 2006); *Women's Med. Prof'l Corp. v. Baird*, 438 F.3d 595, 611 (6th Cir. 2006).

Plaintiff first argues that it had a protected property interest. Property interests are not defined by the Constitution. *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972). Rather, they are created and defined by "existing rules or understandings that stem from an independent source such as state law." *Id.* An abstract need or unilateral expectation is insufficient to create a constitutionally protected property interest; a person must have a "legitimate claim of entitlement." *Roth*, 408 U.S. at 577.

Here, Plaintiff argues that it had a property interest in the six City-owned parcels, for which it executed a purchase agreement with the City.[2] Specifically, it challenges the district court's conclusion that a purchase agreement does not convey any protected property rights. In reaching this conclusion, the district court relied heavily on *Bryan v. City of Madison*, 213 F.3d 267, 275 (5th Cir. 2000). In that case, the Fifth Circuit held that under Mississippi law, a purchase agreement does not convey a property right to develop apartments on a piece of land. *Id.* Rather, the interest conferred by a purchase agreement is "[m]erely a right to get the down payment back if the seller does not make good title." *Id.* at 276. Such an interest "does not give one the right to enter the land, to exclude

[2]Plaintiff also argues that it had a property interest in the seven privately-owned parcels. The complaint states that, in reliance on the City's representations, Plaintiff began to enter into purchase agreements with and paid deposits to the owners of the seven privately-owned parcels. However, the complaint does not allege that Plaintiff had closed on or owned any of these parcels. Regardless, as discussed below, any property interest Plaintiff did possess did not grant it the right to develop the property into condominiums. And Plaintiff does not allege that the City deprived it of the property, by terminating the private purchase agreements or otherwise.

others from the land, or to build anything on the land." *Id.* As a result, the plaintiff in *Bryan* was unable to establish that the city had deprived him of a property interest when it prevented him from building his proposed development on the land. *Id.* Relying upon *Bryan*, the district court in this case concluded that Plaintiff did not have a protected property interest because the purchase agreement did not convey any rights. *Taylor*, 2006 WL 3085394, at *3.

Although we question whether *Bryan* stands for the proposition that a purchase agreement does not convey any property rights at all, neither the parties nor we have been able to find any Michigan cases to the contrary. Under Michigan law, it is well-settled that the execution of a land contract[3] operates as an equitable conversion: "[a] vendee in a land contract is vested with the equitable title in the land, and the legal title remains in the vendor as security for the payment of the purchase price." *Charter Twp. of Pittsfield v. City of Saline*, 302 N.W.2d 608, 609-610 (Mich. Ct. App. 1981); *see also Gilford v. Watkins*, 70 N.W.2d 695, 697 (Mich. 1955); 1 JOHN G. CAMERON, MICHIGAN REAL PROPERTY LAW: PRINCIPLES AND COMMENTARY § 16.3 (3d ed. 2005). But there is a dearth of case law when it comes to the extent of the interest, if any, conveyed by a purchase agreement, or what Michigan courts sometimes refer to as a "contract for the sale of land," *see Zurcher v. Herveat*, 605 N.W.2d 329, 341 (Mich. Ct. App. 1999). Even this court has noted that, although "[t]he execution of a land contract

[3]Under Michigan law, a land contract is an agreement "for the sale of an interest in real estate in which the purchase price is to be paid in installments (other than an earnest money deposit and a lump-sum payment at closing) and no promissory note or mortgage is involved between the seller and the buyer." *Zurcher v. Herveat*, 605 N.W.2d 329, 341 (Mich. Ct. App. 1999) (citing 1 JOHN G. CAMERON, MICHIGAN REAL PROPERTY LAW: PRINCIPLES AND COMMENTARY § 16.1 (2d ed. 1993)).

implicates the Doctrine of Equitable Conversion" under Michigan law, "[t]here is no such doctrine applicable to purchase agreements." *Wasik v. Adams*, No. 90-2089, 1991 WL 270093, at *3 (6th Cir. Dec. 13, 1991).

Ultimately, however, even assuming that the purchase agreement granted Plaintiff a property interest, and even if the City's termination of the agreement amounted to a deprivation of that interest, Plaintiff cannot establish the third prong of a procedural due process violation: that it did not receive adequate procedural protections. This court has held that "a state breach of contract action may...provide an adequate remedy for some deprivations of a contractually created property interest." *Ramsey v. Bd. of Educ.*, 844 F.2d 1268, 1273 (6th Cir. 1988). Indeed, "it is neither workable nor within the intent of section 1983 to convert every breach of contract claim against a state into a federal claim." *Id.* (quoting *San Bernardino Physicians' Servs. Med. Group, Inc. v. San Bernardino County*, 825 F.2d 1404, 1408 (9th Cir. 1987)). The *Ramsey* court explained that "[a] state breach of contract action is most clearly an adequate remedy for a property deprivation when the only basis for federal jurisdiction is that a state actor is one of the contracting parties." *Id.*

The City's termination of the purchase agreement in this case falls within the category of cases that would most appropriately be remedied by a state breach of contract action. Any property interest could have only arisen out of the purchase agreement itself; the only difference between this case and other garden-variety breach of contract case is that the City happened to be one of the contracting parties. Further, the purchase agreement between Plaintiff and the City explicitly contemplated breach by either party and provided for liquidated damages in the event of breach. Because a breach of contract action would be an adequate

procedural protection for the City's termination of the purchase agreement, Plaintiff's complaint failed to set forth a claim for violation of procedural due process on the basis of any equitable interest created by the purchase agreement.

Moreover, the purchase agreement did not grant Plaintiff a property interest in building the proposed condominium development. Insofar as Plaintiff argues that it should have been permitted to *develop* the property, neither the purchase agreement nor any equitable interest that could have vested in it as a result granted it any such right. *See Bryan*, 213 F.3d at 276.

Plaintiff also cannot claim a property interest in a residential zoning classification for its development. Plaintiff argues that the facts of this case are similar to those of *Nasierowksi Bros. Investment Co. v. City of Sterling Heights*, 949 F.2d 890 (6th Cir. 1991), in which this court held that the plaintiff possessed a property interest in the original zoning classification in effect before the property was subsequently rezoned. *Id.* at 897. Unlike the developer in *Nasierowski*, however, Plaintiff never owned the property for which he claimed a particular zoning classification.[4] And, more importantly, at all relevant times the property Plaintiff sought was zoned as commercial; it was never zoned as residential, Plaintiff's desired zoning classification.

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[4]Because he did not own the property, Plaintiff also did not "actively pursue [ ] and complete [ ] a course of action of an inarguably substantial character to construct [the] development on the property" before the property was rezoned, as the plaintiff in *Nasierowski* had done. *Nasierowski*, 949 F.2d at 897; *see also City of Lansing v. Dawley*, 225 N.W. 500, 500 (Mich. 1929) (holding that permit holder acquired no vested right to erect building in violation of subsequent zoning ordinance where he had done nothing toward construction of the building).

Thus, Plaintiff had no legitimate claim of entitlement to its desired zoning classification.

Finally, Plaintiff did not have a property interest in the City Council's approval of the zoning ordinance, the amendment to the City's Master Land Use Plan, or approval of the final site plans. A person cannot have a property interest in a procedure itself. *Richardson v. Twp. of Brady*, 218 F.3d 508, 518 (6th Cir. 2000). In addition, a property interest cannot arise where a decisionmaker's power is wholly discretionary. *See McClain v. Nw. Cmty. Corr. Ctr. Judicial Corr. Bd.*, 440 F.3d 320, 330 (6th Cir. 2006); *see also Richardson*, 218 F.3d at 517; *Silver v. Franklin Twp. Bd. of Zoning Appeals*, 966 F.2d 1031, 1036 (6th Cir. 1992). Here, the City Council had discretion to "deny, approve, or approve with conditions [Plaintiff's] request for PUD [Planned Unit Development] District classification."[5] Taylor Municipal Code, Art. 32.00, Section 32.03(2)(A)(7), J.A. at 426. And although the City had completed first readings of the ordinances to amend the Master Land Use Plan and rezone the thirteen parcels of land, it had not finally approved these ordinances.[6] Moreover, Plaintiff's argument that the City Council was required to enact the ordinances simply because it had completed first readings of them is at odds with Michigan law, which requires cities to provide for the initial publication of *all* ordinances before

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[5]In fact, the City Council could not approve the PUD classification until the proposed development complied with the City's Master Land Use Plan. Taylor Municipal Code, Appendix A, Art. 32.00, Section 32.02(1)(A)(4), J.A. at 418.

[6]Under the City Charter, "[n]o ordinance shall be passed at the same meeting at which it is introduced." Taylor City Charter, Chapter VII, Section 7.3(c).

they can become operative.[7] *See* MICH. COMP. LAWS § 117.3(k). Finally, Plaintiff points to no provision that limited the City Council's discretion in approving or denying its final site plans.[8] Given the multiple steps necessary to reach final approval of the project—and the City Council's discretion at every turn—we conclude that Plaintiff did not have a legitimate claim of entitlement to develop the property.

Finding that Plaintiff failed to state a procedural due process claim on the basis of a property interest, we now turn to Plaintiff's argument that Defendants deprived it of a liberty interest. A liberty interest refers to more than just freedom from bodily restraint. *Roth*, 408 U.S. at 572. It also refers to "the right of the individual...to engage in any of the common occupations of life." *Id.* (quoting *Meyer v. Nebraksa*, 262 U.S. 390, 399 (1923)); *see also Conn. v. Gabbert*, 526 U.S. 286, 292 (1999) (noting that "the liberty component of the...Due Process Clause includes some generalized right to choose one's field of private employment"). Based upon the Supreme Court's language in *Meyer*, this court has held that "freedom to choose and purse a career" qualifies as a constitutionally protected liberty interest. *Wilkerson v. Johnson*, 699 F.2d 325, 328 (6th Cir. 1983).

Assuming that the holding of *Wilkerson* is an appropriate extension of *Meyer*, Plaintiff has failed to allege

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[7]Plaintiff further argues that, once the first readings were completed, Michigan law required the City Council to vote on the zoning ordinance. *See* MICH. COMP. LAWS § 125.3401(5). Even assuming that is true, the City Council still would have had the discretion to adopt or reject it.

[8] In fact, it was only until after approval of the PUD classification that Plaintiff could have filed an application for final site plan approval. Taylor Municipal Code, Appendix A, Art. 32.00, Section 32.03(2)(D)(3), J.A. at 418.

facts sufficient to support even a plausible claim that Defendants interfered with its right to pursue its occupation as a developer. The factual allegations in the complaint only support a conclusion that Defendants interfered with Plaintiff's right to develop the *specific property* at issue in this case. Such an allegation is insufficient to establish a liberty interest. *See Parate v. Isibor*, 868 F.2d 821, 831 (6th Cir. 1989) (noting that the plaintiff "was not denied the choice of his career, but remains free to pursue his chosen profession at another university"); *see also Wilkerson*, 699 F.2dat 326-27 (holding that plaintiffs alleged deprivation of liberty interest where state law denied them an opportunity to enter into the barbering profession altogether). Accordingly, Plaintiff also failed to state a procedural due process claim on the basis of a liberty interest.

2. Substantive Due Process Claim

Plaintiff also claims that Defendants violated its substantive due process rights. "The doctrine that governmental deprivations of life, liberty or property are subject to limitations regardless of the adequacy of the procedures employed has come to be known as substantive due process." *Grinter v. Knight*, 532 F.3d 567, 572 (6th Cir. 2008) (quoting *Bowers v. City of Flint*, 325 F.3d 758, 763 (6th Cir. 2003)). "Governmental actions that burden the exercise of...fundamental rights or liberty interests are subject to strict scrutiny, and will be upheld only when they are narrowly tailored to a compelling government interest." *Seal v. Morgan*, 229 F.3d 567, 574 (6th Cir. 2000). On the other hand, "[g]overnment actions that do not affect fundamental rights or liberty interests...will be upheld if...they are rationally related to a legitimate state interest." *Id.* at 575.

"To establish a violation of substantive due process, a plaintiff must first establish the existence of a constitutionally-protected property or liberty interest." *Silver*, 966 F.2d at 1036. Thus, insofar as Plaintiff has failed to assert a property or liberty interest for purposes of procedural due process, its substantive due process claims also fail. Even assuming that Plaintiff alleged a protected property interest based upon its purchase agreement with the City, this state-created contractual right is not "a proper subject of federal protection under the doctrine of substantive due process." *See Bowers*, 325 F.3d at 764 (holding that the state-created contractual right to a discount on one's water bills is adequately redressed in a state breach of contract action and therefore is not subject to substantive due process protections); *see also Charles v. Baesler*, 910 F.2d 1349, 1353 (6th Cir. 1990) ("The substantive Due Process Clause is not concerned with the garden variety issues of common law contract."). Regardless, the City has also offered a rational basis for its actions, which we discuss below in the context of the equal protection claim. The district court therefore properly dismissed Plaintiff's substantive due process claim.

B. Motion to Supplement

The parties devoted much of their oral argument in this case to Plaintiff's next argument: that the district court erred when it denied Plaintiff's motion to file additional exhibits to the pending cross-motions for summary judgment. Both parties filed motions for summary judgment on July 9, 2007. On the same day, Plaintiff also filed a motion to compel discovery, which was referred to a magistrate judge. In the meantime, Plaintiff responded to Defendants' motion for summary judgment on August 3, 2007. As an exhibit to its response, Plaintiff included an affidavit, signed by Plaintiff's counsel, which stated that

Plaintiff had not yet received complete responses to its discovery requests. The affidavit also stated that "Plaintiff anticipates that additional facts essential to justify its opposition to defendants' motion for summary judgment will be forthcoming in those responses to discovery." J.A. at 2096.

On August 24, 2007, the magistrate judge granted Plaintiff's motion to compel and—in accordance with Plaintiff's request that the documents be produced at least one week prior to the summary judgment hearing—ordered Defendants to produce the documents on or before September 12, 2007. The hearing on the cross-motions for summary judgment was held as scheduled on September 20, 2007. Plaintiff, however, claims that it was unable to complete its review of the 3,000 pages submitted by Defendants before the summary judgment hearing. Four days after the hearing, Plaintiff filed an emergency motion to supplement its summary judgment pleadings with the documents it had recently received from Defendants.

The district court denied Plaintiff's motion, treating it as a request for further discovery under Rule 56(f) for the Federal Rules for Civil Procedure. Rule 56(f) allows a party to request additional discovery prior to a district court's grant of summary judgment:

> If a party opposing the motion [for summary judgment] shows by affidavit that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:
>
> (1) deny the motion;

(2) order a continuance to enable affidavits to be obtained, depositions to be taken, or other discovery to be undertaken; or

(3) issue any other just order.

FED. R. CIV. P. 56(f). This case does not present the typical Rule 56(f) situation, however: at the time it filed its motion to supplement, Plaintiff was not seeking a continuance to conduct *further* discovery, it was seeking to supplement the record with discovery it had *already received*. Nevertheless, both parties have presented their arguments on this issue within the framework of Rule 56(f). And it is plausible that, at the time Plaintiff responded to Defendants' motion for summary judgment, Rule 56(f) obligated it to inform the district court of the need to wait for additional discovery if that discovery was indeed necessary to the district court's adjudication of the motion. *See Vill. of Oakwood v. State Bank & Trust Co.*, 539 F.3d 373, 384 (6th Cir. 2008) (noting that a Rule 56(f) affidavit is "necessary in order to preserve the argument that the grant of summary judgment was too hasty and precluded necessary discovery" (internal quotation marks omitted)).

To the extent that Plaintiff's argument is governed by Rule 56(f), however, it fails. Although the district court appears to have erred by not acknowledging the affidavit filed by Plaintiff's counsel in the response to Defendant's motion for summary judgment, any such error was harmless. Where a party fails to identify the material facts it hopes to uncover pursuant to Rule 56(f), a district court does not abuse its discretion in adjudicating a summary judgment motion without further discovery. *United States v. Dairy Farmers of Am., Inc.*, 426 F.3d 850, 863 (6th Cir. 2005). Moreover, an affidavit that contains only general and conclusory statements or lacks any details or specificity is

insufficient under Rule 56(f). *Ball v. Union Carbide Corp.*, 385 F.3d 713, 720 (6th Cir. 2004). Here, Plaintiff's affidavit provided no information whatsoever as to the relevance—let alone the materiality—of the requested discovery. Because the affidavit did not comply with Rule 569f), the district court was within its discretion in ruling on the summary judgment motions before additional discovery was submitted.

Moreover, to the extent that Plaintiff's argument can be seen as a challenge to the district court's refusal to allow supplementation of the record with already-discovered evidence, it still fails. First, Plaintiff received all of the time it had requested to review the documents. At the hearing on the motion to compel, counsel for Plaintiff asked the magistrate judge to order Defendants to produce the documents "a minimum of seven days prior to [the] motion for summary judgment hearing so that I have an opportunity to review those documents with my client." J.A. at 2312. The magistrate judge granted that request, ordering Defendants to produce the documents by September 12, 2007. Plaintiff cannot now complain that the time period its own attorney requested was inadequate. Second, Plaintiff failed to state specifically what the additional discovery documents would show, and how those documents were material to the district court's decision on the motion for summary judgment. Even at oral argument, Plaintiff was still unable to point to anything which, if presented to the district court, would have affected the outcome of this case. As a result, the district court did not abuse its discretion in denying Plaintiff's motion to supplement.

C. Motion for Summary Judgment

Plaintiff next contends that—even without considering the additional evidence with which it sought to supplement

the record—Defendants were not entitled to summary judgment on the equal protection claim. We review a district court's grant of summary judgment *de novo*. *White v. Baxter Healthcare Corp.*, 533 F.3d 381, 389 (6th Cir. 2008). Summary judgment is proper "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). At the summary judgment stage, the district court must construe the evidence and draw all reasonable inferences in favor of the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Jones v. Potter*, 488 F.3d 397, 403 (6th Cir. 2007).

The Fourteenth Amendment provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend,. XIV, § 1. Under the Equal Protection Clause, the states cannot make distinctions that 1) burden a fundamental right; 2) target a suspect class; or 3) intentionally treat one individual differently from others similarly situated without any rational basis. *Radvansky v. City of Olmstead Falls*, 395 F.3d 291, 312 (6th Cir. 2005). Where, as here, a plaintiff alleges a violation of the third type, it is said to proceed on a "class of one" theory. *Club Italia*, 470 F.3d at 298.

To succeed on a "class of one" equal protection claim, Plaintiff must first prove that it has been treated differently from similarly situated individuals. *Braun v. Ann Arbor Charter Twp.*, 519 F.3d 564, 575 (6th Cir. 2008); *see also Vill. of Willowbrook v. Olech*, 528 U.S. 562, 565 (2000); *Silver*, 966 F.2d at 1036. To satisfy this threshold inquiry, it must allege that it and other individuals who were treated differently were similarly situated in all material respects. *See TriHealth, Inc. v. Bd. of Comm'rs*, 430 F.3d

783, 790 (6th Cir. 2005); *c.f. Ercegovic v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 352 (6th Cir. 1998) (holding that, to make out a prima facie case of disparate treatment, a plaintiff must show that he and other employees were similarly situated "in all *relevant* respects").

Here, Plaintiff claims that the City Council has never denied a developer a second reading of its PUD classification after completing all prior administrative steps, and that the mayor has never unilaterally rescinded a purchase agreement without vote by the City Council. Plaintiff offered affidavits by current and former City officials in support of this assertion. Although these affidavits appear to create an issue of fact as to whether Plaintiff was treated differently than other developers, they do not specify how Plaintiff was similarly situated to any of these other developers. And "[b]are allegations that 'other' applicants, even 'all other' applicants, were treated differently" is insufficient; a plaintiff must show that "these 'other' applicants were similarly situated to the plaintiff." *GJR Inv., Inc. v. County of Escambia*, 132 F.3d 1359, 1367-68 (11th Cir. 1998).

Further, unlike any of the prior developers, Plaintiff's proposals were considered by two differently-composed City Councils—one composed before the November 8, 2005 elections, and one composed after the elections. The First Circuit has observed that timing and context are both relevant to the similarly situated inquiry:

> In the land-use context, timing is critical and, thus, can supply an important basis for differential treatment...[C]ourts must be sensitive to the possibility that differential treatment—especially differential treatment following a time lag—may indicate a change in policy rather than an intent to

> discriminate. Consequently, the most reliable comparisons are likely to be from roughly the same time frame.

Cordi-Allen v. Conlon, 494 F.3d 245, 253 (1st Cir. 2007) (internal citation omitted); *see also Purze v. Vill. of Winthrop Harbor*, 286 F.3d 452, 455 (7th Cir. 2002) (noting that individuals were not similarly situated where they submitted plat requests at different time periods and had the requests granted by different and previous boards). In this case, Mayor Priebe testified that part of his campaign was focused on slowing residential development in the City. Thus, even if Plaintiff is correct that it was treated differently than developers had been treated in the past, the election of a new mayor and a new City Council—with new priorities—belies any assertion that Plaintiff and the prior developers were similarly situated. And although Plaintiff argues that Mayor Priebe approved a development agreement for a PUD of condominium unites in the City after he was elected, Plaintiff does not identify how this project was similarly situated to its own.[9]

Even assuming that Plaintiff created an issue of fact as to whether it was treated differently than similarly situated developers, the City possessed a rational basis for its actions. "A 'class of one' plaintiff may demonstrate that government action lacks a rational basis either by negativing every conceivable basis which might support the

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[9]In fact, it appears that the development to which Plaintiff refers, Devonshire Cove, was approved by the City Council *before* the election, on August 16, 2005. J.A. at 2379. The Devonshire Cove development also only consisted of 40 condominium units, not the 240 condominium units sought by Plaintiff. Further, there was no showing that the approved development was originally planned on commercial property and required amendment of the zoning ordinance and Master Land Use Plan, as required for Plaintiff's proposed development.

government action, or by showing that the challenged action was motivated by animus or ill-will." *TriHealth*, 430 F.3d at 788 (6th Cir. 2005).

In this case, the district court correctly concluded that Plaintiff "had not carried its heavy burden of negativing every conceivable basis" for the City's actions. *Id.* at 791. To overcome such a burden, a plaintiff "must demonstrate that the differential treatment [it] was subjected to is so unrelated to the achievement of any combination of legitimate purposes that the court can only conclude that the [government's] actions were irrational." *Id.* The defendant "has no obligation to produce evidence to sustain the rationality of its actions; its choice is presumptively valid and may be based on rational speculation unsupported by evidence or empirical data." *Club Italia*, 470 F.3d at 297 (internal quotation marks omitted). Rather, "[t]he burden falls squarely to the plaintiff, who must overcome the presumption of rationality by alleging that the defendant acted in a manner clearly contrary to law." *Id.*

Here, although they were not required to do so, Defendants produced affidavits and cited deposition transcripts establishing the rationale for their actions: they wanted to curtail residential development because of the oversaturated housing marking in the City, protect the City's financial interests, eliminate overly generous financial subsidies from the City to developers, and preserve green space and wooded land owned by the City. These are clearly reasonable and appropriate objectives for any city council and mayor to have. And although Plaintiff may disagree with them as a policy manner, it offered nothing to prove that they were irrational.

Further, Plaintiff cannot show that Defendants' actions were in any way motivated by ill-will or animus. To

demonstrate animus or ill-will, "a plaintiff must prove that the challenged government actions were motivated by personal malice *unrelated to the defendant's official duties*." *Klimik v. Kent County Sheriff's Dep't*, 91 Fed. Appx. 396, 401 (6th Cir. 2004) (citing *Hilton v. City of Wheeling*,209 F.3d 1005, 1008 (7th Cir. 2000)). Plaintiff claims that Priebe spoke out solely against Plaintiff's development before he became mayor, and committed several acts designed to ultimately thwart the project once he was elected. Indeed, this establishes that Defendants were diligent in acting to stop Plaintiff's project from proceeding. But Plaintiff has failed to produce evidence that Mayor Priebe or the City Council were motivated by any kind of personal malice or vindictiveness unrelated to their official duties or policy positions. Plaintiff's own vice president of marketing and director of sales testified that she did not believe Mayor Priebe had any intention to discriminate against Plaintiff individually; he would have done the same thing to any developer who was before him at that time. At most, then, Plaintiff's evidence demonstrated animus toward the *project*, not toward Plaintiff itself. Accordingly, summary judgment on the equal protection claim was proper.[10]

D. Judicial Bias

Finally, Plaintiff argues that the district court judge exhibited improper bias in favor of Defendants sufficient to warrant reversal of its rulings and remand to a different district court judge. First, we note that Plaintiff has waived this issue on appeal by failing to raise it before the district

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[10]Because Plaintiff cannot establish an equal protection violation, we need not address whether Defendants were entitled to summary judgment on the basis of qualified immunity. *See Harrison v. Ash*, 539 F.3d 510, 517 (6th Cir. 2008); *see also Saucier v. Kratz*, 533 U.S. 194, 201 (2001).

court in a motion to recuse or otherwise. *Hurst v. Warren*, 62 Fed. Appx. 603, 605 (6th Cir. 2003).

Even were we to reach the merits of Plaintiff's claim, it would still fail. We "will not ascribe bias to a district judge in the absence of evidence that he has abandoned his role as an impartial arbiter." *Lilley v. BTM Corp.*, 958 F.2d 746, 753 (6th Cir. 1992). To warrant a recusal of a district judge, a party must allege "facts which a reasonable person would believe would indicate a judge has a personal bias" against the party. *Ullmo ex rel. Ullmo v. Gilmour Acad.*, 273 F.3d 671, 681 (6th Cir. 2001). Judicial bias must be predicated on "a personal bias as distinguished from a judicial one, arising out of the judge's background and association and not from the judge's view of the law." *Id.*; *see also United States v. Grinnell Corp.*, 384 U.S. 563, 583 (1966).

Here, Plaintiff alleges that the district judge was biased because he permitted Defendants to submit untimely pleadings, responses to discovery requests, and other documents without sanction, and neither denied or did not rule on several of Plaintiff's motions. Notably absent are any facts that would support a finding of personal bias on the part of the judge. A party cannot establish bias simply because it is unhappy with a district judge's rulings. *Ullmo*, 273 F.3d at 681. Accordingly, we reject Plaintiff's claim of judicial bias.

III. CONCLUSION

For the foregoing reasons, we **AFFIRM** the judgment of the district court.

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

TAYLOR ACQUISITIONS, L.L.C,
Plaintiff-Appellant,

v. Case No. 07-2242

CITY OF TAYLOR, ET AL.
Defendants-Appellees,

_____/

BEFORE: McKEAGUE and GRIFFIN, Circuit Judges; and WEBER, District Judge.*

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

Leonard Green
Clerk

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MICHIGAN

SOUTHERN DIVISION

TAYLOR ACQUISITIONS,
Plaintiff,

vs. Case No. 06-10650

CITY OF TAYLOR and
CAMERON G. PRIEBE,
Defendants,

_____/

OPINION AND ORDER

This matter is before the Court on Cross-Motions for summary judgment. Both parties have briefed the issues and a hearing was held September 20, 2007. For the following reasons, the Court **GRANTS** Defendants' Motion for summary judgment; and **DENIES** Plaintiff's Motion for summary judgment. Plaintiff's Motion to strike from Defendants' Motion for summary judgment the Affidavit of Neil Silver, etc., is **MOOT.**

I. BACKGROUND

This action arises out of the failure of the Taylor City Council to vote to approve the final site plans for Plaintiff's proposed residential development and the cancelling of Plaintiff's purchase agreement for City owned land.

Plaintiff seeks to develop residential housing in the City of Taylor. The proposed location is approximately 31 acres at Racho Road and Superior Parkway. The land is composed of thirteen parcels, six of which are owned by the City of Taylor.

On December 16, 2003, Plaintiff began discussing with City of Taylor officials development of residential housing at the Racho Road site, to be called the "Taylor Enclaves." Plaintiff met with City officials several times. According to Plaintiff, City officials assured Plaintiff that it would enter into an agreement to sell the six City owned parcels; enter into an agreement for Brownfield development[1]; re-zone the property; and approve the project. Based on these assurances, Plaintiff also entered purchase agreements, which required non-refundable deposits, with owners of the other parcels.

On July 19, 2004, the Taylor City Council voted to amend the Brownfield Plan to include Plaintiff's residential development. Plaintiff continued to prepare and revise plans for final approval by the City. On September 20, 2005, the City Council voted to approve a Brownfield Development Agreement and a purchase agreement for the six parcels of land owned by the City. In accordance with the agreements, Plaintiff submitted a $50,000 deposit to the City's escrow agent.

At the November 1, 2005 City Council hearing, the City Council took three actions: (1) it held a public hearing on Plaintiff's Brownfield Plan Amendment, but did not vote on whether to approve the resolution; (2) it voted to approve the first reading of an ordinance to amend the City's Master Plan;

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[1]Property approved as part of the Brownfield Plan received several incentives regarding taxes and financing.

and (3) it voted to approve the first reading of a zoning ordinance rezoning the thirteen parcels needed for Plaintiff's project from "Regional Business" to "Townhouse Residential/Planned Unit Development" ("PUD"). The second vote was planned for November 15, 2005.

On November 8, 2005, Defendant Cameron Priebe ("Priebe") defeated incumbent City of Taylor Mayor, Gregory Pitoniak. Three incumbent City Council members were also defeated.

While running for office, Priebe attended meetings and allegedly disrupted proceedings related to Plaintiff's development. Plaintiff claims Priebe demonstrated an "unjustified animosity toward the project." Following his election, Priebe moved up the swearing in date of the new elected officials, allegedly in order to prevent a final vote on Plaintiff's development. On November 15, 2005, rather than vote on Plaintiff's development, the City Council chose to table the issue until the following meeting on December 5, 2006. However, on December 1, 2005, Plaintiff received a letter from counsel for the City stating that it was terminating the purchase agreement for the six City owned parcels of land. Plaintiff's deposit, with interest, was refunded.

At the December 5, 2005, City Council meeting, Plaintiff's project was not on the agenda. Mayor Priebe allegedly advised citizens at the end of the meeting that the project was "dead." No vote for final approval of Plaintiff's project was held.

On February 14, 2006, Plaintiff filed a Complaint against the City of Taylor and Mayor Priebe alleging: (1) violation of its procedural and substantive due process rights; and (2) denial of equal protection. Plaintiff's due process claims were dismissed on October 27, 2007, pursuant to a

motion to dismiss. The only remaining claim is Plaintiff's claim for denial of equal protection.

II. STANDARD OF REVIEW

Under Fed. R. Civ. P. 56(c), summary judgment may be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Copeland v. Machulis*, 57 F.3d 476, 478 (6th Cir. 1995). A fact is "material" and precludes a grant of summary judgment if "proof of that fact would have [the] effect of establishing or refuting one of the essential elements of the cause of action or defense asserted by the parties, and would necessarily affect application of appropriate principle[s] of law to the rights and obligations of the parties." *Kendell v Hoover Co* , 751 F.2d 171, 174 (6th Cir. 1984). The court must view the evidence in the light most favorable to the nonmoving party and it must also draw all reasonable inferences in the nonmoving party's favor. *Cox v Kentucky Dept of Transp.*, 53 F.3d 146, 150 (6th Cir. 1995).

III. ANALYSIS

The only claim at issue in this case is whether Defendants violated Plaintiff's right to equal protection when the purchase agreement was cancelled and Defendants refused to hold a second vote on the project.

As a preliminary matter, Defendants argue, for the first time, that the purchase agreement was void by its own terms because it was not executed by July 22, 2005, thus precluding a claim for denial of equal protection. The purchase agreement was not executed until September 20, 2005, when it was approved by a vote of the City Council. Defendants'

argument is unavailing. All parties proceeded as if the purchase agreement were binding after July 22, 2005, until Defendants sent a letter indicating that the purchase agreement was rescinded in December 2005. Defendants are stopped from now asserting that the purchase agreement was void on July 22, 2005.

Under the Equal Protection Clause of the Fourteenth Amendment, no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The Equal Protection Clause "embodies the general rule that States must treat like cases alike but may treat unlike cases accordingly." *Radvansky v. City of Olmstead Falls*, 395 F.3d 291, 312 (6th Cir. 2005). "To establish a claim for relief under the Equal Protection Clause, a plaintiff must demonstrate that the government treated the plaintiff disparately as compared to similarly situated persons and that such disparate treatment either burdens a fundamental right, targets a suspect class, or has no rational basis." *Club Italia Soccer & Sports Organization, Inc v Charter Township of Shelby*, 470 F.3d 286, 298 (6th Cir. 2006).

In this case, Plaintiff proceeds under the so-called "class of one" theory, and must prove that Defendant's actions lacked any rational basis. *Id.* "A 'class of one' plaintiff may demonstrate that government action lacks a rational basis either by negativing every conceivable basis which might support the government action, or by showing that the challenged action was motivated by animus or ill-will." *TriHealth, Inc v. Board of Commissioners, Hamilton County*, 430 F.3d 783, 788 (6th Cir. 2005). To prevail, a plaintiff must demonstrate "that the differential treatment they were subjected to is so unrelated to the achievement of any combination of legitimate purposes that the court can only conclude that the [government's] actions were irrational." *Id.* "Under rational basis review, the [government] has no

obligation to produce evidence to sustain the rationality of its actions; its choice is presumptively valid and may be based on rational speculation unsupported by evidence or empirical data." *Club Italia*, 470 F.3d at 298 (citation omitted). "The burden falls squarely to the plaintiff, who must overcome the presumption of rationality by alleging that the defendant acted in a manner clearly contrary to law." *Id.*

A. Was Plaintiff Intentionally Treated Differently From Other Similarly Situated?

Plaintiff argues that the relevant comparison for the similarly situated analysis is "other developers who interacted with the City of Taylor." [Motion, p.4]. According to Plaintiff it was treated differently because "at no time prior to, or since, has any developer been denied a second reading by the Taylor City Council after having been reviewed by and approved by all of the relevant City Boards and commissions...other than the Taylor Enclaves project, at no time prior to, or since, has a Mayor unilaterally rescinded a construction contract which had been previously approved or ratified by the Taylor City Council." *Id.* Plaintiff cites the declaration and testimony of several individuals who stated that the mayor had never before unilaterally rescinded a purchase agreement, and had never seen a housing development project go through all of the approval processes including a first reading before the City Council, and then be denied the opportunity for a second reading. [Motion, Exhibits 5, p.10; Exhibit 11, ¶¶34-35; Exhibit 16, ¶¶38-39]. Whether individuals are similarly situated is a question of fact. *McDonald v. Village of Winnetka*, 371 F.3d 992, 1002 (7th Cir. 2004); and *Graham v Long Island Rail Road*, 230 F.3d 34, 39 (2nd Cir. 2000).

Defendant relies on an affidavit from Frederick Zorn, the former Director of Economic Development for the City of Taylor to demonstrate that Plaintiff is not similarly situated to

any other residential developers. Zorn was employed by the City of Taylor from February 1997 to July 2005. He avers that Plaintiff's Taylor Enclaves project was unique compared to other residential developments because:

> (a) It was the only residential development in the City of Taylor which was contrary to the City's Master Plan and which required a changing of the City's Master Plan for the development to go forward;
>
> (b) It was the only residential development project since 2001 which required the City to rezone the property from business/commercial to residential, in order for the development to go forward;
>
> (c) It was the only residential development that came to the City for approval at a time when it was becoming clear that the residential housing market was failing dramatically; and
>
> (d) It was the only residential development that came before the current administration and City Council for approval.

[Motion, Exhibit I]. Defendants also point out that Deborah Johnson, Vice-President of Taylor Acquisitions testified that there were no other projects similarly situated to the Taylor Enclaves project. [Motion, p.12]. But, a reading of the deposition transcript reveals that Johnson was talking about the particular style of the housing, i.e. three story stacked ranches. Defendants do not offer any support that in order to be "similarly situated" for purposes of an equal protection analysis, the housing projects must be of the exact same architectural style. Particularly in this case, where it does not appear that the particular style had anything to do with the

Mayor's decision to rescind the purchase agreement or the denial of a second reading before City Council.

Plaintiff challenges Zorn's assertions. Plaintiff cites several residential housing projects that it argues also required re-zoning and changes to the City's Master Plan. [Response, pp ix-x and Exhibit 4]. However, Plaintiff does not identify if the projects were similarly situated, i.e., that they were similar to the Plaintiff's project and successfully went through the approval processes. Finally, Plaintiff argues that Defendant Priebe has subsequently approved a development agreement for a PUD of condominiums in the City of Taylor, but does not identify how this project is similarly situated.

At the hearing, Plaintiff conceded that there were insufficient facts to make a determination if the other projects mentioned by Plaintiff were similarly situated. Plaintiff also alleged for the first time at the hearing, that Plaintiff had been waiting for records to be produced by Defendants in order to support its claim that other developers were similarly situated and treated differently. However, as Plaintiff pointed out, Plaintiff did not offer any supplemental authority when that discovery was received. Further, if Plaintiff was in need of additional discovery in order to properly respond to Defendants' Motion for summary judgment, it was required to file an affidavit pursuant to Fed. R. Civ. P. 56(f):

> Should it appear from the affidavits of a party opposing the [summary judgment] motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

This rule has been interpreted to require that a party "indicate to the district court its needs for discovery, what material facts it hopes to uncover, and why it has not previously discovered the information." *Cacevic v. City of Hazel Park*, 226 F.3d 483, 488 (6th Cir. 2000). Plaintiff did not file a Rule 56(f) affidavit, and did not by any other means indicate to the court a need for discovery, what material facts would be discovered, and why it had not previously been discovered. Thus, the lack of information for a determination of whether the developers Plaitniff mentioned were similarly situated and treated differently, is not a basis to deny Defendants' request for summary judgment.

"[S]imilarly situated individuals must be very similar indeed." *McDonald*, 371 F.3d at 1002. See *GJR Investments, Inc. v County of Escambia*, 132 F.3d 1359, 1367-1368 (11th Cir. 1998)("[w]ith regard to similarly situated prong, the complaint does not present a single instance in which a similarly situated developer was granted a permit; it merely alleges that nameless, faceless other permit applicants were given better treatment. Bare allegations that other applicants, even all other applicants, were treated differently do not state an equal protection claim."). Based on the evidence presented to the court, the bare assertion that several developments before Defendants were treated differently is insufficient to support a claim for violation of equal protection. Thus, Defendants are entitled to summary judgment.

B. Did Defendants' Actions Lack a Rational Basis?

Even if Plaintiff could establish a genuine issue of material fact regarding whether it was treated differently than other similarly situated, Plaintiff fails to establish that Defendants' lacked a rational basis for their actions. A plaintiff can establish the lack of a rational basis either by

"negativing every conceivable basis which might support the government action, or by demonstrating that the challenged government action was motivated by animus or ill-will." *Club Italia*, 470 F.3d at 298.

Defendants claim that their actions were because: (1) there were too many multi-family residential developments in various stages of construction in the City; (2) too much of the City's green space and wooded areas were being sold off; (3) there was an oversaturation of residential housing in the City that was not selling, leading to a decrease in the value of existing homes; and (4) the vacant homes created an unsightly and unsafe condition in the community. [Motion, p.16, citing Exhibit G and H]. Defendants also present the Affidavit of Zorn, who averred that too many residential homes were being constructed and not sold. [Motion, Exhibit I]. Zorn included a chart of the various residential developments and the number of unsold units. *Id.*

Plaintiff attempts to negative the assertions Defendants made for failing to allow Plaintiff to proceed with its project by arguing that Defendants "have failed to provide to this Court any evidence which was not created by defendants for this case, or which was contemporaneous with defendants' actions." [Response, p.12]. As stated above, Defendants have no burden to sustain the rationality of their choices; the burden falls to Plaintiff to demonstrate the irrationality. *TriHealth*, 430 F.3d at 790-791. Defendants are under no obligation to present any evidence to support their decision, so the argument that some of the evidence presented is insufficient is irrelevant. Plaintiff also relies on the declaration of former City Council member James Riddle and former mayor Greg Pitoniak. While their declarations may raise a question of fact as to several of the Defendants' proposed reasons for terminating Plaintiff's project, it does not negative every basis offered, or every conceivable basis.

Plaintiff fails to carry its "heavy burden" of negativing every conceivable basis for Defendants' decision. *Id.*

Plaintiff also argues that there is evidence that Defendants were motivated by animus or ill-will. Plaintiff cites Defendant Priebe's deposition, where he admitted that he came to the October 5, 2005 Planning Commission meeting. [Motion, Exhibit 3, pp.56-58]. Priebe admitted that he asked the Planning Commission to delay any action on Plaintiff's development until after the new administration took office, if elected. *Id.* Plaintiff also relies on the declaration of Christopher Kemp, a former member of the City of Taylor Planning Commission. Kemp characterizes the October 5, 2005 exchange between Defendant Priebe and the Planning Commission as "contentious." *Id.* He claims Priebe asked the Planning Commission to "put the brakes" on Plaintiff's project. *Id.*

After the approval by City Council of the Taylor Enclaves project on November 1, 2005, Defendant Priebe was elected and took office on November 14, 2005. Plaintiff alleges Defendant Priebe violated the City's Charter by taking office two weeks early in order to prevent the approval of Plaintiff's project at a second reading of City Council scheduled for November 15, 2005. The November 15, 2005 vote was tabled until December 6, 2005. However, the second reading of the Taylor Enclaves project was not put on the agenda for the December 6, 2005 City Council meeting. On December 1, 2005, Defendants issued a letter rescinding the purchase agreement between the City and Plaintiff. Plaintiff claims the unilateral decision to rescind the purchase agreement was made by Defendant Priebe, without the required approval of City Council. Sam Blumenstein, President of Taylor Acquisitions, claims he contacted the City and individual City Council members to have the Taylor Enclaves project put back on the City Council agenda, to no

avail. [Motion, Exhibit 10, ¶¶29-30]. Taylor City Council member Gregory Bzura averred that he was asked by Blumenstein how to get the project back on the City Council agenda and he told Blumenstein that Defendant Priebe would not allow the matter to be placed back on the agenda. [Motion, Exhibit 11, ¶29]. Plaintiff argues that never before, or since, has Priebe unilaterally rescinded a purchase agreement with a developer, or allowed a project to go through all of the processes only to be denied the opportunity for a second reading before City Council. [Motion, Exhibits 5,p.10; Exhibit 11, ¶¶34-35; Exhibit 16, ¶¶38-39].

The evidence presented by Plaintiff does not establish that Defendant Priebe acted with animus or ill-will towards *Plaintiff*. Plaintiff's evidence, if believed, establishes that Defendant Priebe was diligent, and perhaps acted without authority, in stopping Plaintiff's *project* from proceeding. However, Plaintiff does not offer any evidence that the motivation for stopping the project was animus or ill-will towards Plaintiff, rather than a belief that the project was not in the best interests of the City. As noted above, Defendants assert: (1) there were too many multi-family residential developments in various stages of construction in the City; (2) too much of the City's green space and wooded areas were being sold off; (3) there was an oversaturation of residential housing in the City that was not selling, leading to a decrease in the value of existing homes; and (4) the vacant homes created an unsightly and unsafe condition in the community. [Motion, p.16, citing Exhibit G and H]. Defendant Priebe alleges it was a platform of his campaign to stop the selling off of City property for residential developments such as Plaintiff's. Notably, Johnson, Vice-President of Taylor Acquisitions, testified that she did not believe Priebe had any intention to discriminate against Plaintiff, but rather would have behaved the same towards whatever developer was developing that assemblage of properties. [Response, Exhibit

E].

"A government action is considered irrational only if it is unrelated to the achievement of any combination of [ ] legitimate purposes." *Scarbrough v. Morgan County Board of Educ.*, 470 F.3d 250, 261 (6th Cir. 2006). Plaintiff's evidence demonstrates that Defendant Priebe acted, at least in part, with the legitimate purpose to stop a residential development he believed was not in the best interests of the City. In an unpublished case, the Sixth Circuit cited several similar cases:

> To demonstrate animus or ill will under *Olech*[2], a plaintiff must prove that the challenged government actions were motivated by personal malice unrelated to the defendant's official duties. *Hilton v. City of Wheeling*, 209 F.3d 1005, 1008 (7th Cir. 2000); see also *Bower*, 44 Fed. Appx. At 678 (finding that plaintiff presented an *Olech* claim when he alleged that a mayor manipulated police by hiring procedures to deny plaintiff a full-time job because of the plaintiff's family ties); *Albiero v. City of Kankakee*, 246 F.3d 927, 932 (7th Cir. 2001)(stating that plaintiff can present a 'class of one' claim by showing "that the state government took an action that was a spiteful effort to "get" him for reasons wholly unrelated to any legitimate state objective."). Because [the plaintiff] does not allege any facts or produce evidence suggesting that defendants harbored any personal animus toward him, he does not raise a genuine issue of material fact concerning animus in support of his *Olech*

[2] *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000); seminal U.S. Supreme Court case regarding "class of one" equal protection claims.

claim.

Kilmik v. Kent County Sheriff's Department, 91 Fed. Appx. 396, 401 (6th Cir. 2004).

Likewise, in this case, Plaintiff fails to create a genuine issue of fact concerning whether Defendants acted with personal animus towards Plaintiff. Rather, Plaintiff's evidence at most demonstrates an animus towards the project—based on legitimate government concerns[3] It cannot be that a strong desire to stop a particular project, where there is no evidence that the desire is based on animus towards the purveyors of the project, rises to the level of a constitutional violation.

Accordingly, Defendants are entitled to summary judgment on Plaintiff's claim for violation of the Equal Protection Clause of the Fourteenth Amendment. Additionally, because the court did not consider the Affidavit of Neil Silver in its ruling, Plaintiff's Motion to strike from Defendant's Motion for summary judgment the Affidavit of Neil Silver is moot. The court does not reach Defendants' argument regarding qualified immunity.

IV. CONCLUSION

For the foregoing reasons, the Court **GRANTS** Defendants' Motion for summary judgment; and **DENIES** Plaintiff's Motion for summary judgment. Plaintiff's Motion to strike from Defendants' Motion for summary judgment the Affidavit of Neil Silver, etc., is **MOOT.**

IT IS SO ORDERED.

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[3]The Court does not decide whether the proffered concerns were justified, only that they were legitimate concerns.

/s/ Sean F. Cox
Sean F. Cox
United States District Judge

Dated: September 27, 2007

I hereby certify that a copy of the foregoing document was served upon counsel of record on September 27, 2007, by electronic and/or ordinary mail.

/s/ Jennifer Hernandez
Case Manager